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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 1414

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* *DEATH PENALTY CASE*

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37 pp

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Charles E. McDowell, Jr., by his undersigned counsel, asks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*, pursuant to Rule 39. Respondent has been represented by the undersigned court-appointed attorney in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

DATED: March 25, 1998

Andrea G. Asaro
Counsel of Record for Respondent
Charles E. McDowell, Jr.

QUESTIONS PRESENTED

1. At the penalty phase of Respondent's capital trial the jury sent the trial judge a note stating that the 11-juror, pro-death majority had concluded that the mitigating circumstances Respondent had presented did not constitute "either testimony or evidence that should be considered." Although the jury's note requested additional guidance, the trial court gave no supplemental instructions. Under these circumstances, did the Ninth Circuit Court of Appeals, in its *en banc* decision, correctly hold, consistent with Boyde v. California and Bollenbach v. United States, that the jury's note disclosed a violation of Eddings v. Oklahoma, and that the trial court erred by failing to correct the jury's misunderstanding?

2. Does the Ninth Circuit Court of Appeals' *en banc* holding, that under Eddings v. Oklahoma Respondent was entitled to supplemental instructions to correct the jurors' stated intention to give Respondent's mitigating evidence no weight, announce a "new rule" within the meaning of Teague v. Lane?

TABLE OF CONTENTS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* i

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

REASONS WHY THE PETITION SHOULD BE DENIED 8

I. THE *EN BANC* DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL PRECEDENT OF THIS COURT OR OF ANY CIRCUIT COURT 8

A. The Ninth Circuit Correctly Concluded That Supplemental Instructions Were Required In This Case To Disabuse The Jurors Of Their Mistaken Belief That They Could NOt Consider Respondent's Mitigating Evidence 8

B. The Ninth Circuit's *En Banc* Decision Is Fully Consistent With *Buchanan v. Angelone*, and With *Eddings*, *Lockett* and *Boyde* 11

C. The Ninth Circuit's *En Banc* Decision Is Consistent With *Bollenbach v. United States* and Its Progeny In the Circuit Courts and Imposes No "Unprecedented and Improvident Obligation" On Trial Courts 16

II. THE *EN BANC* DECISION BELOW ANNOUNCES NO "NEW RULE" WITHIN THE MEANING OF *TEAGUE v. LANE* 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993),
cert. denied, 511 U.S. 1060 (1994) 26

Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993),
cert. denied, 511 U.S. 1097 (1994) 26

Bollenbach v. United States,
326 U.S. 607 (1946) . . . . . passim

Boyde v. California,
494 U.S. 370 (1990) . . . . . ii, 6-8, 10-14

Brecht v. Abrahamson,
507 U.S. 619, 637 (1993). 10

Buchanan v. Angelone, ___ U.S. ___,
118 S.Ct. 757 (1998) . . . . . passim

Davis v. Greer,
675 F.2d 141 (7th Cir.)
cert. denied, 459 U.S. 975 (1982) 16

Eddings v. Oklahoma,
455 U.S. 104 (1982) . . . . . passim

Fetterly v. Paskett, 15 F.3d 1472 (9th Cir.),
cert. denied, 513 U.S. 914 (1994) 26

Francis v. Franklin,
471 U.S. 307 (1985) 14

Franklin v. Lynaugh,
487 U.S. 164 (1988) 13//

Hitchcock v. Dugger,
481 U.S. 393 (1987) 10, 24

Jeffers v. Lewis, 974 F.2d 1075 (9th Cir. 1992),
resulting in a new decision, Jeffers v. Lewis,
38 F.3d 411 (9th Cir. 1994), cert. denied,
514 U.S. 171 (1995) 26

Jiminez v. Myers, 12 F.3d 1474 (9th Cir. 1993),
cert. denied, 513 U.S. 810 (1994) 26

Johnson v. Texas,
509 U.S. 350 (1993) 13

Lockett v. Ohio,
438 U.S. 586 (1978) . . . . . passim

McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997),
amended and superseded in part by,
116 F.3d 364 (9th Cir. 1997) . . . . . passim

McDowell v. Calderon,
130 F.3d 833 (9th Cir. 1997) . . . . . passim

McKensie v. Day, 57 F.3d 1461 (9th Cir.),
cert. denied, 514 U.S. 1104 (1995) 26

McKoy v. North Carolina,
494 U.S. 433 (1990) 10

Mills v. Maryland,
486 U.S 367 (1988) 9, 14, 24

Newlon v. Armontrout,
885 F.2d 1328 (8th Cir. 1989),
cert. denied, 497 U.S. 1038 (1990) 18

Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994),
cert. denied, 513 U.S. 1117 (1995) 26

Penry v. Lynaugh,
492 U.S. 302 (1989) 10, 13

People v. Davenport,
710 P.2d 861 (Cal. 1985) 15

Powell v. United States,
347 F.2d 156 (9th Cir. 1965) 18, 25

Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990),
cert. denied, 502 U.S. 868 (1991) 26

Rupe v. Wood, 93 F.3d 1343 (9th Cir. 1996),
cert. denied, 117 S.Ct. 1017 (1997) 26

Skipper v. South Carolina,
476 U.S. 1 (1986) 10, 21, 24

Teague v. Lane,
489 U.S. 288 (1989) . . . . . ii, 8, 22, 26

United States v. Andrew,
666 F.2d 915 (5th Cir. 1982) 20

United States v. Bolden,
514 F.2d 1301 (D.C. Cir. 1975) 17, 25

United States v. Braverman, 522 F.2d 218 (7th Cir. 1974),
cert. denied, 423 U.S. 985 (1975) 20

United States v. Collom, 614 F.2d 624 (9th Cir. 1979),
cert. denied, 446 U.S. 923 (1980) 19

United States v. Ellis,
23 F.3d 1268 (7th Cir. 1994) 22

United States v. Felici, 54 F.3d 504 (8th Cir.)
cert. denied, 116 S.Ct. 251 (1995) 22

United States v. Gordon,
844 F.2d 1397 (9th Cir. 1988) 17, 25

United States v. Hayes,
794 F.2d 1348 (9th Cir. 1986),
cert. denied, 479 U.S. 1086 (1987) 20

United States v. Lakich,
23 F.3d 1203 (7th Cir. 1994) 22

United States v. Nunez,
889 F.2d 1564 (6th Cir. 1989) 17

United States v. Papia,
560 F.2d 827 (9th Cir. 1977) 19

United States v. Petersen,
513 F.2d 1133 (9th Cir. 1975) 17

United States v. Slaughter,
128 F.3d 623 (8th Cir. 1997) 22

United States v. Stevens,
38 F.3d 167 (5th Cir. 1994) 18

United States v. Walker,
575 F.2d 209 (9th Cir. 1978),
cert. denied, 439 U.S. 931 (1978) 17

United States v. Warren,
984 F.2d 385 (9th Cir. 1993) 17, 25

United States v. White,
794 F.2d 365 (8th Cir. 1986) 20

United States v. Zimmerman,
943 F.2d 1204 (10th Cir. 1991) 18

Statutes

18 U.S.C. § 3006A i

28 U.S.C. § 2254 5

Cal. Penal Code § 190.3 8

IN THE SUPREME COURT OF THE UNITED STATES

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No. 1414

ARTHUR CALDERON, Warden,

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v.

CHARLES E. McDOWELL, JR.,

Respondent.

Respondent Charles E. McDowell, Jr., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's *en banc* opinion in this case. That opinion is reported at McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997).

STATEMENT OF THE CASE

Respondent Charles E. McDowell, Jr. ("Respondent" or "McDowell") was convicted in California in 1984 of one count each of murder, attempted murder, attempted rape and burglary and was sentenced to death. At the penalty phase of McDowell's trial the prosecutor presented evidence of a prior conviction for lewd and lascivious conduct and an uncharged alleged prior rape. Respondent's counsel presented testimony from several of McDowell's relatives, a former neighbor, a parole officer and a psychiatric nurse who testified that, in essence, McDowell had had an extraordinarily abusive childhood. McDowell

presented evidence that he had endured years of severe physical abuse at the hands of his father, who had openly engaged in incestuous relations with his daughter, Respondent's sister. See Order and Opinion of the United States District Court for the Central District of California, filed November 21, 1995 ("District Court Opinion"), pp. 6-9.[1/]

At closing argument the prosecutor argued that under California's statutory sentencing "formula" the aggravating circumstances outweighed the mitigating circumstances, which mandated a sentence of death. He argued, over defense counsel's objection, that inapplicable mitigating circumstances — particularly the absence of any expert psychiatric testimony that McDowell suffered any mental disorder or impairment — should be weighed as aggravating circumstances. District Court Opinion, pp. 68-70, 81; McDowell v. Calderon, 107 F.3d 1351, 1364-65 (9th Cir. 1997), amended and superseded in part by 116 F.3d 364 (9th Cir. 1997).

Defense counsel alluded to the testimony that McDowell had been physically beaten as a child and that his father had sexually molested his own daughter, but did not argue the mitigating import of the evidence his witnesses had presented, and made no reference to any of the statutory sentencing factors relevant to mitigation. District Court Opinion, pp. 41-42, n. 32.

The trial court instructed the jury, inter alia, to "consider, take into account, and be guided by" a list of 10 undifferentiated statutory sentencing factors, including "defendant's

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[1/] The district court's Order and Opinion is not reported but is included in the Appendix submitted to this Court by Petitioner.

character or personal history," (CALJIC 8.84.1, 1984 Rev.),[2/] and gave the standard

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[2/] The jury was instructed:

> In determining which penalty is to be imposed on defendant . . . you shall consider, take in to account, and be guided by the following factors if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (e) Whether or not the offense was committed under the circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (h) The age of the defendant at the time of the crime.
>
> (i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any other aspect of the defendant's character or personal history that the defendant offers as a basis

(continued...)

instruction that "one mitigating circumstance may outweigh several aggravating circumstances, or one aggravating circumstance may outweigh several mitigating circumstances." (CALJIC 8.84.2). District Court Opinion, pp. 45-46. The instructions were all provided to the jury in writing. McDowell, supra, 130 F.3d at 838.

During their third day of deliberation the jury sent the trial judge the following note:

> We, the jury in the above entitled action, request the following:
>
> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which [of the] following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
> 2. Love/hate relationship with father/mother.
> 3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.
> 4. Religious extremes confused defendant.
> 5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.
> 6. Accused of death of favorite sister.[3/]
> 7. Stress of divorce from family.
> 8. Rejection of mother's love during teen years.

[2/](...continued)
for a sentence less than death.

District Court Opinion and Order at 45-46. As given to the jury in this case statutory factor 190.3(k) was re-lettered as factor "(j)" because another statutory factor was deleted from the list by stipulation.

[3/] Evidence was presented that when he was a child McDowell's little sister was struck by a car and killed outside the family residence. District Court Opinion and Order, pp. 7-8.

Thank you.

McDowell, supra, 130 F.3d at 835; emphasis supplied by the Court.

Defense counsel urged the court to instruct the jury that the factors enumerated in the note should be considered mitigating circumstances. Id. at 836. The prosecutor forthrightly agreed that they were "proper factors to consider." Id. at 837-838. The trial court nonetheless declined to give any supplemental instruction. Instead of answering the jury's question the court merely referred the jury to an unspecified instruction from the original charge and reread the "weighing" instruction:

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
>
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
>
> Then you have another instruction, the concluding instruction which reads as follows:
>
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions. . . .

Id. at 836. The trial court then asked the foreman, "Does that answer your question for now?" The foreman immediately answered, "Yes, sir." Id. The jury resumed its deliberations that Friday afternoon and, after a weekend break, returned its sentence of death the following Monday. Id.

After exhausting his state appellate and post-conviction remedies Respondent sought habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Central District of California, which denied relief. On appeal to the United States Court of

Appeals for the Ninth Circuit a three-judge panel initially affirmed, unanimously, in a decision filed February 26, 1997. McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997), amended and superseded in part by, 116 F.3d 364 (9th Cir. 1997). Respondent then filed a petition for rehearing with suggestion for rehearing *en banc*. On May 23, 1997 the Court issued an order amending its opinion, by deleting Judge Stephen S. Trott as concurring in the majority opinion and by adding his concurring and dissenting opinion. Judge Trott concurred in the majority's affirmance of the conviction but would have reversed Respondent's death sentence. McDowell v. Calderon, 116 F.3d 364 (9th Cir. 1997). Judge Trott concluded, in reliance on Boyde v. California, 494 U.S. 370 (1990), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), that because the trial court had failed to clarify or correct the jury's confusion and mistake regarding the mitigating evidence presented, there was a reasonable likelihood that the jury had not applied the instructions correctly and had not understood that they were to consider Respondent's mitigating circumstances in support of a sentence less than death. McDowell, 116 F.3d at 367-68. Judge Trott voted to accept the suggestion of rehearing *en banc*, which was granted by order filed July 18, 1997.

Following rehearing *en banc*, the Ninth Circuit, in a seven-to-four decision written by Judge Trott, vacated Respondent's death sentence and remanded to the district court with instructions to grant the writ and to order a new penalty phase trial in sate court.

SUMMARY OF ARGUMENT

This is a capital case. During their deliberations at the penalty phase the jury, having correctly been instructed under California law, sent the trial judge a note disclosing that the 11-juror, pro-death majority had concluded, erroneously, that the mitigating evidence the defense had presented could not even be considered, and that the one juror who had considered this evidence had determined that it warranted imposition of a sentence of life without parole. Although the jury's note requested further "direction," the trial court gave no supplemental instructions, but merely referred the jury to an unspecified instruction from the original charge and re-read another, non-responsive instruction.

The Court below, in an *en banc* decision, correctly concluded that because the trial court had failed to disabuse the jurors of their mistaken belief that they should disregard Respondent's mitigating evidence, and give it no weight, there was a "reasonable likelihood" that McDowell was deprived of his constitutional right to have all of his sentencing jurors consider all of the evidence he presented. Boyde v. California, supra, 494 U.S. 370; Eddings v. Oklahoma, supra, 455 U.S. 104.

This case does not warrant review by this Court. The validity of California's capital sentencing scheme is not at issue, see Boyde v. California, supra, 494 U.S. 370; nor is the sufficiency or accuracy of any of the instructions that were given in this case, compare, Buchanan v. Angelone, supra 118 S.Ct. 757. The Court below merely applied this Court's well-established capital sentencing jurisprudence, dating from Eddings v. Oklahoma and most recently reaffirmed in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761 (1998), to the facts of this case, which feature the jury's telling note. Thus, contrary to Petitioner's

assertion, the decision below announces no "new rule" of any sort, within the meaning of Teague v. Lane, 489 U.S. 288 (1989).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE *EN BANC* DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL PRECEDENT OF THIS COURT OR OF ANY CIRCUIT COURT

A. The Ninth Circuit Correctly Concluded That Supplemental Instructions Were Required In This Case To Disabuse The Jurors Of Their Mistaken Belief That They Could Not Consider Respondent's Mitigating Evidence.

As the Ninth Circuit noted in its decision below, the parties agree that the instructions initially given in this case were legally unobjectionable. These included an instruction listing the sentencing factors the jury was to consider under California Penal Code section 190.3 and an instruction regarding the "weighing" of aggravating and mitigating circumstances. It is also undisputed that so-called "catch-all" factor (k) correctly instructed the jury to consider "any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death," including the mitigating evidence Respondent presented. Indeed, the constitutional adequacy of this sentencing scheme was decided by this Court in Boyde v. California, supra, 494 U.S. 370, and is not at issue in this case.

However, even though the jury had correctly been instructed as to its sentencing obligation, and had been given the instructions in writing, after deliberating for over two days the jury candidly expressed their confusion and sought additional guidance:

We, the jury in the above entitled action, request the following:

Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which [of the] following circumstances can be considered mitigating circumstances.

1. Inadequate or insufficient psychiatric help.

2. Love/hate relationship with father/mother.

3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.

4. Religious extremes confused defendant.

5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.

6. Accused of death of favorite sister.

7. Stress of divorce from family.

8. Rejection of mother's love during teen years.

Thank you.

McDowell, supra, 130 F.3d at 835; emphasis supplied by the Court.

As the Court below correctly noted, "the plain language of the jury's request for guidance demonstrates that 11 jurors were confused about the law and erroneously believed they could not consider eight aspects of McDowell's background as mitigating evidence." Id. at 837.

The Court below correctly concluded that because Respondent was entitled to the jury's consideration of that evidence, under Lockett, Eddings and their progeny,[4/] the jury's

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[4/] See, e.g., Mills v. Maryland, 486 U.S 367 (1988) (state unanimity requirement for mitigating circumstances held to violate the Eighth Amendment by improperly limiting the (continued...)

error was constitutionally significant. Under the particular circumstances of this case, in which as many as 11 jurors had stated their intention to disregard McDowell's indisputably mitigating evidence, see Skipper v. South Carolina, 476 U.S. 1 (1986),[5] the Court below concluded the trial court was required to do more than merely rely on the very instructions that had left the jury confused in the first instance — regardless of their facial accuracy. For some reason, those standard, unobjectionable instructions, which had already been given orally by the trial judge and which the jury had had two days to review in writing, were not sufficient for this jury. To avert obvious Eddings error, the Ninth Circuit held, the trial court was required, under Bollenbach v. United States, 326 U.S. 607, 612-13 (1946), to correct the jury's misunderstanding with "concrete accuracy." 130 F.3d at 839. Because the trial court failed to disabuse the jurors of their mistaken belief — stated in their note — that the evidence McDowell had presented could not be considered, the Court concluded that there was a "reasonable likelihood" that this jury applied the instructions given in a way that "prevent[ed] the consideration of constitutionally relevant evidence." Id at 841, citing Boyde v. California, supra, 494 U.S. at 380. The Court further reasoned that such error necessarily is "substantial and injurious," within the meaning of Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). 130 F.3d at 841.

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[4](...continued)
jury's consideration of mitigating circumstances); McKoy v. North Carolina, 494 U.S. 433 (1990) (same); Hitchcock v. Dugger, 481 U.S. 393 (1987) (improper disregard for nonstatutory mitigating circumstances); Skipper v. South Carolina, 476 U.S. 1 (1986) (improper exclusion of relevant mitigating evidence); and Penry v. Lynaugh, 492 U.S. 302 (1989) (defendant entitled to jury's consideration of evidence regarding mental retardation).

[5] Petitioner has not argued that the jury was confused as to whether the factors listed in the jury's note were mitigating as opposed to aggravating.

B. The Ninth Circuit's *En Banc* Decision Is Fully Consistent With *Buchanan v. Angelone*, and With *Eddings*, *Lockett* and *Boyde*.

Petitioner asserts that this Court's recent decision in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757 (1998), in which the jury sought no additional guidance and sent out no note of any kind, "totally undercuts" the Ninth Circuit's *en banc* decision below. Id. at 9. According to Petitioner:

> The Ninth Circuit's decision was based on the concluded [sic] inadequacy of an instruction which covered an area as to which this Court later, in Buchanan, found there was no obligation to instruct at all.

Petition at 8. Although the constitutionality of California's sentencing scheme is not at issue in this case, Petitioner also argues, again erroneously, that the Ninth Circuit "misapplied Eddings . . . to invalidate" a jury instruction given in this case. Id.; emphasis supplied.

Contrary to Petitioner's assertion, the Ninth Circuit did not "invalidate" any California sentencing instruction; to the contrary, the Court and the parties all agreed that the instructions given in this case were legally adequate under Eddings, per Boyde. The court below merely held, consistent with Eddings, and Boyde, that the trial court in this case had erred by failing to correct the jury's mistaken belief, expressed in their note, that they could not consider Respondent's mitigating evidence.

The Ninth Circuit's decision is also consistent with Buchanan, which is readily distinguishable on its facts, and in any event squarely reaffirms the long-established holdings of Eddings and Boyde, on which the decision below expressly relied. In Buchanan the defendant in a multiple-murder capital case in Virginia challenged the sufficiency of the state's standard penalty phase jury instructions. Under that sentencing scheme the jury was

instructed that if they found beyond a reasonable doubt that the defendant's conduct was vile, "then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." Buchanan, 118 S.Ct. at 759-760.

At trial the defendant had presented substantial evidence regarding his troubled childhood. An expert psychiatrist had testified that the defendant was under extreme emotional distress at the time of the offense. In his closing argument the defendant's attorney had explained the concept of mitigation and had argued at length and in detail the mitigating import of the specific evidence presented. Id.; emphasis supplied.

Defense counsel then requested that the jury be given four special instructions, tailored to the mitigating evidence presented, in addition to the standard instructions. The trial court denied the request. Id. The jury deliberated and reached a verdict without requesting any further instruction or guidance. On the penalty phase verdict form the jury stated that they had unanimously found the Defendant's conduct was vile and, "having considered the evidence in mitigation of the offense," had unanimously fixed the punishment at death. Id.; emphasis supplied.

This Court rejected Buchanan's argument that he was constitutionally entitled to tailored instructions regarding the mitigating evidence he had presented, and to express instructions regarding the concept of mitigation. The Court concluded that Virginia's standard instructions satisfied the requirements of Lockett and Eddings, in that they did not constrain or preclude the jury's consideration of any mitigating evidence. Id. at 699. As in Boyde, the record in Buchanan disclosed no basis to doubt that the jury had understood its

sentencing task; i.e., there was no "reasonable likelihood that the [jury] . . . understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner." Buchanan, 118 S.Ct. at 763, quoting Boyde, 494 U.S. at 386. The court in Buchanan thus reaffirmed precisely the jurisprudence on which the Ninth Circuit relied in this case:

> In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 317-318 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Johnson v. Texas, 509 U.S. 350, 362 (1993); Penry, supra, at 326; Franklin v. Lynaugh, 487 U.S. 164, 181 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in Boyde v. California, 494 U.S. 370 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration of constitutionally relevant evidence." Id., at 380; see also Johnson, supra, at 367-368.

Buchanan, 118 S.Ct. at 761.

In this case, as in Buchanan, the sentencing instructions originally given properly satisfy the requirements of Eddings and Lockett in that they permitted the jury to consider the mitigating evidence McDowell presented. See Boyde, supra 494 U.S. at 380. Indeed, Respondent has not argued that the jury was erroneously or inadequately instructed in the first instance. However, the record in this case, unlike that in Buchanan or in Boyde, does disclose a serious basis to doubt that the jury actually understood its sentencing task, notwithstanding the facial accuracy of the instructions. By its note the jury put on the record

that as many as 11 of its members had resolved to disregard some or all of McDowell's mitigating evidence.

Indeed, the jury's note distinguishes this case from the vast majority of capital cases, in which "[t]here is no extrinsic evidence of what the jury . . . actually thought" about mitigating circumstances. Mills v. Maryland, 486 U.S. 367, 381 (1988). In those cases it is presumed that they jury followed the instructions given. Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985). The reviewing court is left to examine what this Court more recently has referred to as the "context of the proceedings," to determine whether the jury in fact considered a defendant's proffered evidence in mitigation of his offense, or instead was confused or misled. Buchanan, 118 S.Ct. at 762, quoting Boyde at 383.

In this case the "context of the proceedings" conspicuously includes the jury's note, which the Ninth Circuit correctly took at face value: as a candid statement of the jurors' misunderstanding of the law and their sentencing task. Contrary to Petitioner's repeated attempts to recast the jury's note as a mere "inquiry" about the evidence, or about how much weight to give it (see, e.g., Petition at 3, 5, 11, 12 n. 5), the note is a statement of the 11-jurors' mistaken belief that the evidence Respondent had presented did not constitute "either testimony or evidence that should be considered" — at all. Under these circumstances, it can no longer be presumed that the jury correctly followed the instructions originally given. The Ninth Circuit thus concluded, consistent with Boyde and Buchanan, that the because the trial court failed to correct the jury's misunderstanding there was a "reasonable likelihood" that the jury did misapply the instructions so and did refuse to consider the mitigating evidence that Respondent had presented in support of a sentence less than death.

The fact that the instructions that were originally given were facially unobjectionable is thus legally irrelevant, as the Ninth Circuit correctly points out. McDowell, supra, 130 F.3d at 838-339. In fact, McDowell has not alleged that the instructions that were given in this case affirmatively misled or constrained the jury in its consideration of the mitigation evidence he presented. In the Ninth Circuit McDowell did not challenge the constitutionality of California's statutory scheme. In Buchanan, by contrast, the defendant had argued that Virginia's standard instructions did not provide the jury with adequate guidance about the concept of mitigation and did not inform the jury that the evidence he had presented constituted mitigating circumstances. Buchanan, 118 S.Ct. at 760-761.

McDowell, on the other hand, has attributed the jury's confusion not to the instructions given but to other sources. He has argued that the prosecutor improperly confused the jury and falsely skewed their sentencing determination by arguing that the absence of potentially mitigating circumstances should be counted as an aggravating circumstances. Notably, the prosecutor explicitly told the jury that the absence of any expert psychiatric evidence of "extreme mental or emotional disturbance" "is an aggravating circumstance."[6/] Respondent's own attorney failed to argue the mitigating import of the lay testimony that the defense did present and made no reference to the sentencing factors relevant in mitigation.

[6/] The three-judge panel correctly concluded that while the prosecutor properly could argue that there was no evidence of mental impairment, "[t]he prosecutor could not argue, however, that under California law this lack of evidence constituted a positive aggravating factor. See People v. Davenport, 710 P.2d 861 (Cal. 1985)." The Court found that any Davenport error was harmless. McDowell v. Calderon, 107 F.3d at 1364-65.

Ultimately, however, the extrinsic source of the jury's confusion is irrelevant. Whatever the reason for the jury's confusion, the original charge became inadequate, in this case, once the jury informed the trial court that it was mistaken about the law. By failing to correct the jury's misunderstanding the trial court left the jurors free to do precisely what their note said they would do — give Respondent's mitigating evidence no weight, in violation of Eddings, supra, 455 U.S. at 114-115 (although the jury determines the weight to be given to mitigating evidence, the jury "may not give it no weight by excluding such evidence from their consideration.") Given the jury's note, the Ninth Circuit correctly concluded that there was a "reasonably likelihood" that the jurors had applied the instructions originally given in a way that violated Respondent's federal constitutional right under Eddings.

C. The Ninth Circuit's *En Banc* Decision Is Consistent with *Bollenbach v. United States* and Its Progeny In the Circuit Courts and Imposes No "Unprecedented and Improvident Obligation" On Trial Courts.

As the Ninth Circuit correctly observed, it is settled and "unremarkable" that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." McDowell, supra, 130 F.3d at 839; quoting Bollenbach v. United States, supra, 326 U.S. at 612-613. As the "governor of the trial," Bollenbach, 326 U.S. at 612, the trial judge has "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." Davis v. Greer, 675 F.2d 141, 145 (7th Cir.) cert. denied, 459 U.S. 975 (1982); quoted in McDowell, 130 F.3d at 839.

The Court below correctly concluded that the jury in this case, having been properly instructed, nonetheless expressed its confusion about mitigating circumstances -- a key legal principle in a capital case. Therefore, reiteration of "the same instructions that for some unknown reason eleven of the jurors did not correctly understand in the first place" was not sufficient, under Bollenbach. McDowell, 130 F.3d at 838. The Court likened this case to United States v. Warren, 984 F.2d 385, 339 (9th Cir. 1993), in which the jury had asked: "Is premeditated to 'hurt' the same as premeditated to 'kill'?" McDowell, 130 F.3d at 839, citing Warren, 984 F.2d at 329:

> In responding to the jury's inquiry in [the circumstances of that case]" it [was] not sufficient for the court to rely on more general statements in its prior charge." United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989). Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to convict Warren of first degree murder. The Court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the Court's attention.

Id., quoting Warren, at 330.

The Court below also cited the following additional cases, from this and other circuits, in which the courts have held that reliance on the original charge was not sufficient when the jury had expressed its confusion on a legal issue: United States v. Gordon, 844 F.2d 1397, 1401-02 (9th Cir. 1988) (error to rely on original instruction where jury expressed confusion regarding conspiracy counts); United States v. Walker, 575 F.2d 209, 213 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (trial court's response to jury confusion about a controlling legal principle was insufficient because it failed to eliminate that confusion); United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975) (trial court rereading statute and standard instruction was insufficient where jury showed confusion regarding

felony murder); United States v. Petersen, 513 F.2d 1133, 1136 (9th Cir. 1975) ("quite cursory" supplemental instruction misleading and mandates reversal where jury inquiry reveals confusion regarding issue of intent); Powell v. United States, 347 F.2d 156, 157-58 (9th Cir. 1965) (where a jury, having correctly been instructed in the law, then expresses its confusion on a legal principle, "[i]t is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues.") McDowell, 130 F.3d at 839, n. 3.

Others could be added to this list. See, e.g., United States v. Stevens, 38 F.3d 167 (5th Cir. 1994) (court's response to jury inquiry expressing confusion as to role of photograph of gun was inadequate, where court merely instructed the jury to "consider all the evidence in the record" and stated that the court was "not allowed to answer" the jury's question); United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) (error to fail to give supplemental instruction where question from jury addresses central legal issue; "the jury should have been instructed in a way that there was no possibility that the conviction was based on an incorrect legal basis" (emphasis supplied); Newlon v. Armontrout, 885 F.2d 1328, 1334-1335 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990) (the trial court had erred in refusing to clarify the term "depravity of mind," which had not been defined for the jury). Thus, the Court below correctly concluded that reliance on the original charge was not sufficient to correct the jurors' expressed misunderstanding of the concept of mitigating circumstances.

Ignoring the plain words of the Ninth Circuit's decision, and the wealth of relevant case law, Petitioner now asserts that the Court "has, in effect, imposed (indeed, it has

created) a new obligation on state and federal trial courts alike to respond to jury inquiries only with new language." Petition at 6; emphasis supplied. With similar hyperbole, Petitioner maintains that the Court has ruled categorically that the Eighth Amendment "precludes a trial court from responding to a jury inquiry on consideration of potentially mitigating evidence by referring the jury to responsive and legally flawless, but previously given, instructions." Petition at 8 (heading); emphasis supplied.

This is plainly not what the Court below has done. To the contrary, the Court expressly acknowledged that "the manner in which th[e] clarifying task must be done is within the sound discretion of the trial court." McDowell, supra, 130 F.3d at 839; emphasis supplied. The Court also noted that "the federal Courts of Appeal have approved in some federal cases (which the State brings to our attention), the practice of simply rereading or referring the jurors to the instructions already read." Id.; emphasis supplied. The Court correctly distinguished those cases and concluded that in this case reliance on the original charge was not sufficient to clarify and correct an error, under Eddings, of federal constitutional dimension. Id., citing Bollenbach, supra, 326 U.S. at 612-613.[7/]

[7/] The court below correctly distinguished United States v. Collom, 614 F.2d 624 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980), on the grounds, inter alia, that the jury's note in that case was merely "unclear," that the inquiry did not relate to a matter of constitutional importance, and that the trial court had invited the jury to return for further instructions "should the confusion persist." McDowell, 130 F.3d at 839, quoting Collom, 614 F.2d at 631.

Other cases, cited by Petitioner, are likewise distinguishable:

In United States v. Papia, 560 F.2d 827, 843 (9th Cir. 1977), the jury had asked whether one could be found guilty of conspiracy if the acts committed furthered the conspiracy, but were committed for different reasons. The trial court engaged in a colloquy with counsel as to the possible misleading effect of a simple "no" answer. One of the two co-defendants agreed to the re-reading of all of the conspiracy instructions; the other wanted

(continued...)

The Court thus did not create a "new obligation" compelling all trial courts in the future to always respond to jury inquiries by crafting supplemental instructions. The Court merely applied Bollenbach to the facts of this case.

Petitioner also argues, erroneously, that the decision below forces trial courts to follow "the inherently hazardous course" of fashioning "extemporaneous and ad hoc instructional creation[s]" whenever the jury speaks. In thus decrying the pitfalls of supplemental instructions Petitioner not only misconstrues the holding below, which does not compel supplemental responses in all cases, but also flatly misquotes the Court's decision. According to Petitioner:

[7/](...continued)
the trial court to merely say "no." When asked whether a re-reading of the conspiracy instructions would suffice, the jury foreman confirmed that, "[t]hat is what we want." The jury had apparently not been given the instructions in writing.

In United States v. Braverman, 522 F.2d 218 (7th Cir. 1974), cert. denied, 423 U.S. 985 (1975), also cited by Petitioner, the trial court played a tape of the entire charge, in response to the jury's inquiry regarding an accessory count. The jury apparently did not have the instructions in writing. Moreover, the defendant was then acquitted of the accessory count.

In United States v. White, 794 F.2d 365 (8th Cir. 1986), the jury had asked for a definition of conspiracy, which the original charge specifically contained. Here the original instructions, while legally correct, contain no definition of mitigation or mitigating circumstances. Moreover, in White one of the two defendants had agreed to the trial court's rereading of the definition of conspiracy. Id. at 370.

In United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986), cert. denied, 479 U.S. 1086 (1987), the trial court did give substantive supplemental instructions, rather than merely rely on the original charge.

In United States v. Andrew, 666 F.2d 915 (5th Cir. 1982), the jury had asked about the burden of proof on an insanity defense. The trial court referred the jury to a specific instruction from the original charge, identified by its number, which defined insanity and clearly stated that the burden was on the Government to prove sanity. There was also no indication that the jury had been provided with the instructions in writing.

> The inherently hazardous nature of the new-language-only straightjacket in which the Ninth Circuit has encased trial judges is demonstrated by the majority's own creation — that the jury should have been told that it was free to consider any aspect of McDowell's background and character he offered as mitigating and that "some, if not all, of the listed factors, could fall within the category."

Petition at 15 (emphasis supplied), citing McDowell, 130 F.3d at 841. Petitioner then goes on to criticize this proposed response, as a "facially flawed product" that might cause the jury to wonder which of the factors listed in the jury's note could be considered, rather than to consider them all. Id.

In fact, the quoted language is not the Ninth Circuit's "creation" at all, but the California Supreme Court's. Id., quoting People v. McDowell, 46 Cal.3d 551, 578 (1988). The Ninth Circuit merely quoted this language in response to the dissenting judges' concern that the task of responding to a jury's note with supplemental instructions would force trial judges to "embark upon unfamiliar seas fraught with peril." McDowell, 130 F.3d at 843 (Thompson, J. dissenting). The point, in other words, is that even the California Supreme Court conceded that the trial court safely could have given a supplemental response; not that the response it hypothesized in *dictum* was the response that should have been given in this case. Indeed, Ninth Circuit makes clear its own view that "the factors . . . listed in the note" — all of them, and not just "some" of them — "undeniably qualify under Lockett and Eddings as mitigating evidence. See Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986)." Id. at 837. Far from adopting the state court's equivocal *dictum*, the court below stressed that the trial court in this case not only "could" have given supplemental instructions, "but after Eddings . . . was required to take appropriate steps to preserve McDowell's right to a

proper decision by the jury grounded in the Constitution." McDowell, supra, 130 F.3d at 841; emphasis supplied.

As the Court below observed, state and federal judges routinely settle jury instructions and answer juries' questions. Id. at 841. See, e.g., United States v. Slaughter, 128 F.3d 623, 627 (8th Cir. 1997) (supplemental instructions regarding conspiracy); United States v. Felici, 54 F.3d 504 (8th Cir.), cert. denied, 116 S.Ct. 251 (1995) (response to question regarding felon's right to possess weapon); United States v. Lakich, 23 F.3d 1203 (7th Cir. 1994) (supplemental instruction defining "extraordinary inducement" and clarifying jury's obligation to separate consideration to each count); United States v. Ellis, 23 F.3d 1268 (7th Cir. 1994) (supplemental instructions regarding entrapment). As this Court made clear in Bollenbach, that is one of the trial judge's duties as the governor of the trial. 326 U.S. at 612. By abdicating that duty in this case, the trial court allowed the jury to disregard Respondent's mitigating evidence, in violation of Eddings.

II. THE *EN BANC* DECISION BELOW ANNOUNCES NO "NEW RULE" WITHIN THE MEANING OF *TEAGUE V. LANE*

In an attempt to bring this case within the purview of Teague v. Lane, supra, 489 U.S. 288, Petitioner asserts that the *en banc* decision below announces a "new constitutional rule:" that trial courts are categorically "prohibited" from ever responding to jury inquiries by reiterating previously given, legally correct instructions. Petition at 17. The argument ignores the true basis of the Court's holding in this case. As the Court explained, reversal of Respondent's death sentence is dictated by Eddings and Lockett, which long pre-date the finality of McDowell's case in state court and which guarantee him the right to have his

capital sentencing jury consider the mitigating evidence he presented. When the jury in this case informed the trial judge that it believed, erroneously, that it could not consider that evidence, it alerted the court to impending constitutional error. The trial court then allowed that error to go uncorrected, contrary to its obligation under Bollenbach to clarify juror confusion with "concrete accuracy."

Petitioner attempts to distinguish Eddings. Apparently, Petitioner takes the position that in Eddings the trial judge read the law once and misunderstood it, whereas in this case the trial judge asked the jury to take another look:

> True, the instant case can be compared to Eddings in that in each there was an expression related to the sentencer's point of view on consideration of evidence. However, unlike the instant case, the sentencer in Eddings was not subsequently exposed to a proper statement of the law. [¶] In other words, the Ninth Circuit's eosinophilic (sic) analysis suffers from the 'apples and oranges' syndrome. Eddings is directed to the scope of evidence; the instant case concerns the method by which the law is communicated to a jury.

Petition at 19. Whatever this means, the attempt to distinguish Eddings must fail. The trial judge in Eddings, like the jury in this case, mistakenly thought that legally he could not consider the mitigating evidence the capital defendant had presented. He put this on the record, as the jury did here in their note. The fact that in Eddings the law did not preclude the judge's consideration of the evidence at issue, just as here the instructions did not preclude the jury from considering McDowell's mitigating evidence, is irrelevant. What matters is that the sentencer in each case mistakenly believed that the mitigating evidence could not be considered. Under these circumstances, this Court has declined to assume that the sentencer actually did consider the evidence. As Justice O'Connor stated in Eddings:

> Even though the Petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, supra, 455 U.S. at 119 (O'Connor, J., concurring); emphasis supplied.

Moreover, in Mills v. Maryland, supra, 486 U.S. 367, this Court made clear that the source of the impediment to the sentencer's consideration of mitigating evidence is irrelevant:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, 481 U.S. 393 [95 L.Ed.2d 347, 107 S.Ct. 1821] (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by an evidentiary ruling, Skipper v. South Carolina, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117 n., 71 L.Ed.2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at 375; emphasis supplied.

As explained above, the Court below did not hold that a trial court in a capital case may never respond to any jury inquiry by reiterating previously given legally correct instructions. All that the Ninth Circuit held is that in this case the instructions previously given, while legally unobjectionable, were not clearly and concretely responsive to this jury's particular inquiry, which by its terms revealed that 11 jurors had erroneously concluded that

they could not consider the mitigating evidence McDowell had presented. This expression of juror confusion — announcing a violation of McDowell's established right, under Eddings and Lockett, to have all of the jurors consider all of his mitigating evidence — called for supplemental, concrete clarification. McDowell's constitutional right to have his sentencer consider his mitigating evidence was established in Eddings and Lockett, before McDowell was even tried. The requirement that trial court's clarify juror confusion with "concrete accuracy" dates to this Court's 1946 decision in Bollenbach v. United States.

Nor is this "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." Petition at 17, quoting McDowell 130 F.3d at 843 (Kozinski, J., dissenting). Consistent with Bollenbach, the Court below correctly analogized this case to Warren, Gordon, Bolden and Powell, all of which hold that reliance on correct original instructions was not sufficient. Similarly here, the Court below properly focused not so much on the accuracy of the original charge, which was not disputed, but on whether the court had actually clarified the jurors' expressed confusion and corrected their mistake about the law.

Finally, the decision below does not announce a rule requiring trial courts in capital cases to give supplemental instructions that are not constitutionally required to be given in the first instance, per Buchanan. As explained above, McDowell did not argue below that he was constitutionally entitled at the outset to a set of instructions tailored to his particular mitigating evidence, or that the jury was erroneously or inadequately instructed in the first instance. He merely argued that once the jury had informed the court that 11 jurors intended

to disregard his mitigating evidence — which did not occur in Buchanan — corrective measures were required, under Eddings and Lockett.

Because the Court below did not announce a "new rule" in this case Petitioner's contention that the Ninth Circuit has in other cases "regularly failed to apply and implement Teague" is irrelevant. Petition at 22 (heading). In any event, all that is established by Petitioner's string of citations is that the State routinely raises a Teague claim in virtually every habeas corpus case regardless of the merits of the claim.[8/] This case is merely the latest to do so.

[8/] Most of Petitioner's citations are incomplete, typically omitting to note denial of certiorari by this Court. See e.g., Rupe v. Wood, 93 F.3d 1343 (9th Cir. 1996), cert. denied, 117 S.Ct. 1017 (1997); Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 513 U.S. 1117 (1995); Fetterly v. Paskett, 15 F.3d 1472 (9th Cir.), cert. denied, 513 U.S. 914 (1994); McKensie v. Day, 57 F.3d 1461 (9th Cir.), cert. denied, 514 U.S. 1104 (1995); Jiminez v. Myers, 12 F.3d 1474 (9th Cir. 1993), cert. denied, 513 U.S. 810 (1994); Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060 (1994); Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993), cert. denied, 511 U.S. 1097 (1994); Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990), cert. denied, 502 U.S. 868 (1991).

Moreover, *en banc* review, which the Ninth Circuit granted in this case, was granted in only one of the cases Petitioner cites, Jeffers v. Lewis, 974 F.2d 1075 (9th Cir. 1992), resulting in a new decision, Jeffers v. Lewis, 38 F.3d 411 (9th Cir. 1994), cert. denied, 514 U.S. 171 (1995).

CONCLUSION

For the foregoing reasons, Respondent Charles E. McDowell, Jr., respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: March 25, 1998

ROSEN, BIEN & ASARO, LLP

By _____
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-1414

ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. MCDOWELL, JR.,

Respondent.

CERTIFICATE OF SERVICE

I, Andrea G. Asaro, a member of the Bar of this Court, hereby certify that on this 25 th day of March, 1998, I caused one copy of Respondent's Brief in Opposition and Motion to Proceed in Forma Pauperis in the above-entitled case to be mailed, first class postage prepaid, to all parties required to be served in this matter, as indicated on the attached list. I declare under penalty of perjury that the foregoing is true and correct. Executed this 25 th day of March, 1998, at San Francisco, California.

By: Andrea Asaro
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